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JUDICIAL LEGISLATION

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IT IS the popular thing today to attribute to the lawyer alone the loss of public confidence in the bench and bar. Newspapers, magazines, periodicals, pulpits and platforms criticise, caricature and excoriate him. Nor is the bench backward in berating and basting the bar. In the opinions of our courts, in addresses to students and others, and in discussions at conventions and conferences, strictures of the bar by our judges abound. While it is true this criticism is directed to abuses indulged in by but a small fraction of the members of the legal profession, and is well intended, nevertheless, the public, failing to distinguish between the ninety-nine per cent of lawyers who are ethical and honorable, and the one per cent who are unprofessional and dishonest, accepts as applying to the entire profession what is intended only for a small number. If our judges realized that the courts suffer more than the bar by these strictures, they would not occur so frequently, for the public knows that all judges were once lawyers and it rightly reasons, that elevation to the bench does not change the leopard's spots.

Accepting the judges' appraisment of the pettifoggar as applying to the entire legal profession, the people reason that a judge is no better than the lawyers from whose ranks he was drawn, but is invested with power to do greater mischief. A lawyer is expected to be a partisan, whose every effort is directed to save his client harmless. In doing this, if he over-steps law and ethical standards, this departure from propriety is attributed to his zeal to help his client and to his desire to establish a reputation which will insure his being made a judge. The people, however, expect a judge to be without bias and just, but, having in mind his origin, that is, his once having been a lawyer, they are apt to attribute to corrupt motives acts of his which run counter to the prevailing public opinion.

In my opinion, the loss of public confidence in the bench and bar has been brought about mainly by the action of the bench in invading the law-making field and therein legislating by its decisions. Not only have our courts frequently crossed the boundary line which separates the judicial from the legislative field at points where that

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line is irregular and indistinct, but also have broken down the fence between these fields, directly connecting the corner posts which were established and placed by the constitution itself.

Our system of courts and the principles governing them are derived from the common law But in England, the court originally was the king himself. When he ceased to hold the court in person, he delegated this function to one or more of his officers. Such an officer exercised therein the power of the king. His acts could be questioned by no one but the king. When we severed connection with the mother country, we adopted the common law in so far as it did not differ from our theory of government. And a fundamental difference there is that the power vested in the king is here vested in the body of the people. The courts sit as their representatives and exercise only such power as has been granted them either expressly or by implication. If the courts of England at the time of the adoption of our constitution had the power to set aside the findings of fact of juries, it was exercised on the theory that the courts possess the plenary power of the king who can do no wrong. Our courts, in setting aside the findings of juries, have done so on the theory that they possess the power of the sovereign, forgeting that the right of trial by jury, uncontrolled by the court, excepting in so far as control is consistent with our theory of sovereignty, is guaranteed by the fundamental law of the land.

The trial by jury which our constitution guarantees, comprehends every act of the jury from the time it is sworn to try the issues to the return of the verdict and discharge from service. The jury's function is fixed by the constitution itself. The presiding judge, without legislative authorization, has no more power to set aside the jury's findings as to the amount of the damages sustained, than he has to set aside the verdict because the jury, where the testimony was in conflict, gave weight to certain testimony which he believed unworthy of belief. In other words, there is just as much authority in the judge to set aside the verdict of the jury because the jury gave no weight to the testimony of witnesses which he believed to be weighty, as there is to set aside the verdict because the jury determined from the evidence the damages were greater than what he believed them to be.

To concede that a judge has the right to invade the jury's prerogatives in one particular is to open wide the door of the jury room to the domination of a Jefferys. Besides, it is only on the assumption that the jury is either biased, corrupt or incompetent, or all of them, and on the assumption of virtues by the court which the jury does not possess, that the court interferes. What pap does the judicial office supply that makes superhuman, beings of mortal clay? But yesterday our judges were practicing lawyers, possessing the virtues and frailties

of the human race. Today, as the servants of the people, whom they have sworn to serve, they possess wisdom that is little short of omniscience itself. The trial judge, having no prejudices, no sympathies, no selfish motives, but possessing the omniscience of the Almighty has no trouble to point out the errors of the jury and to correct the same by reducing the damages found to an amount by him known to be just and compensative. The appellate court, having all the virtues of the trial court, and others of which the people know not, and could not comprehend if told them, and having the additional advantage of long distance observation of what took place in the jury room months or years before, does not hesitate to mete out exact justice by reducing the damages found by the jury, and already reduced by the trial court, to a lesser sum, assigning as reasons therefor that,

"Such amount should be placed as low as an intelligent jury properly instructed, in the exercise, of sound judgment upon the evidence and the law applicable thereto, would be liable to place it." [1]

Of course, there is no implication in the language used that the jury was not "intelligent," nor that the trial judge was not able to "properly" instruct them. Neither is it implied that the trial judge who reduced the damages found by the jury at $3,500 to $1,800, (the appellate court reduced the damages $800 more) had not exercised "sound judgment." Nor that the dissenting justice of the supreme court, who agreed with the trial judge as to the damages, lacked intelligence or sound judgment.

As was said by our supreme court in the case of *Karsteadt v Phillip Gross H. & C Company,*[2] the verdict of the jury is evidently no guide as to the proper amount of the recovery It does not matter to our courts that the legislature enacted, "that the jury may give such damages, not exceeding $10,000.00 as they may deem fair and just in reference to the pecuniary injury, resulting from such death." Paraphrasing the language applied by the court to the jury in the *Karsteadt* case, it is probable the legislature's sympathy ran away with their judgment when they enacted Section 4256. The legislature did act in language which admits of but one meaning. "The ultimate end of judicial construction is not to determine what the legislature meant, but what the language used by the legislature means." Perhaps the legislature did not mean what their language clearly expresses, or perhaps the legislature which enacted the law was not "intelligent." These questions concern the legislature alone. The courts, which the benighted believe are a co-ordinate branch of our government, like the

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[1] *Ptak v. Kutemeyer*, 182 Wis. 357.

[2] 179 Wis. 110.

king of old, cannot err, cannot do wrong, and possess all power. The people, who believed that a quietus had been forever placed upon the divine right of kings and courts, have reckoned without their host. There remain the Almighty courts.

Once having invaded the legislative field, our courts are careless in their logic. Sometimes they hold the jury is not intelligent enough to answer questions of fact because of lack of light, at other times, because too much light has been shed on the facts.

The first special verdict statute, enacted in 1856, was in derogation of the common law, which provides for a general verdict only Section 10 of Chapter 132 of the Revised Statutes of Wisconsin, 1858, distinguished and defined the two verdicts as follows

"A general verdict is that by which the jury pronounced generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the Court."

At common law and under the general verdict, it is held not only to be proper, but necessary to instruct the jury, that

"the plaintiff cannot recover unless the defendant has been guilty of negligence (defining it) which was the proximate cause (defining it) of the injury to the plaintiff, nor unless the plaintiff has been free from contributory negligence,"

yet when first called upon to construe the special verdict statute, *Ryan v. Rockford Insurance Company*,[3] our court read into the statute that which the legislature had not put in it, and, in order to justify its action, cast aspersions on the jury, in saying:

"It has often been demonstrated in the trial of causes, that the non-expert juryman is more liable than the experienced lawyer or judge to be led away from the material issues of fact involved by some collateral circumstance of little or no significance, or by sympathy, bias or prejudice."

If it be true that a juryman is more liable than the experienced lawyer or judge to be led away from the material issues of fact by collateral circumstances of little or no significance, it is because of his lack of information and knowledge. To perform his constitutional function as juryman, he is entitled to all the light, which under the general verdict, the court is required to give him. Judicial legislation has taken from him this light.

What a travesty on justice to promulgate a rule of law, that

"it is reversible error for the trial court by instructions to the jury to inform the jury expressly or by necessary implications of the effect

[3] 77 Wis. 611.

of an answer or answers to a question or questions of a special verdict upon the ultimate right of either party litigant to recover or upon the ultimate liability of either party litigant!"

If it is error for the court to thus inform the jury, why should a juror who possesses this knowledge be competent to sit in the case? If he is disqualified thereby to sit in the case, then the jury should be interrogated on the *voir dire* as to their education and knowledge with the end in view to obtain a jury so ignorant that they cannot comprehend the effect of their answers upon the final result. Eternal ignorance is the price of justice.

It is a holy and wholesome thought in our judges to entertain a good opinion of their own honesty and ability, (which no attorney questions they possess) but in doing this, it is not necessary by their acts to under value or slander the people who elected them to office and whom they have sworn to serve. The fact that the members of the same court are not always able to agree as to the amount of damages that should have been found by the jury, together with the fact that courts have differed in opinion as much as juries, (some state courts considering as proper what is deemed excessive in others) should be a warning to our courts to abandon both the legislative and the jury fields and follow, "those safeguards to judicial footsteps that have been located along the judicial pathway by the accumulated wisdom of ages." Especially should this be done in view of the fact that the people already have placed their stamp of disapproval on the courts (1) by divesting them of jurisdiction in industrial cases and by conferring such jurisdiction upon the Industrial Commission, using as their main argument for the change, the perversion of the special verdict and the inadequacy of damages awarded for personal injuries, and also (2) by grafting upon the injunction statutes the right of trial by jury in issues of fact arising in any matter relating to violation of any injunction in labor disputes. The enactment into law of the recall of judges and judicial decisions, proposed by men of courage but of distorted vision, needs but a real grievance against our courts and an agitator to fan into flames the slumbering discontent of the masses. In this day of class consciousness, the judges should see to it that they themselves furnish the toilers of this nation no real grievance against the courts. Such a grievance is furnished when they curtail "the palladeum of our civil rights,"—trial by jury In most cases where the court has assumed control of the jury's verdict, such control has operated against the interest of the poor and lowly This may be but a coincidence, but it is difficult to convince those injuriously affected that it is. They cannot understand why the jury's verdict should not be final.

Instead of making the jury's verdict simply advisory to the court, the courts should accept the damages found by the jury, after being clearly instructed by the court as is now required when a general verdict is submitted, as controlling and inviolable, if the damages so found are within the limitations of the statutes, and, in order to counter-act the mischief heretofore done by the courts and the insidious propagandist whose aim is to undermine constitutional government, should stress, on every proper occasion, the fact that trial by jury, consistent with our theory of sovereignty, obtains in these United States.